

ABSTRAK

Walau apa pun falsafah yang menjadi asas sesuatu perkara, sistem keadilan jenayah di negara-negara yang mempunyai Perlembagaan bertulis yang menjamin hak-hak asasi, dengan konsistennya berusaha untuk memelihara, melindungi dan membela dengan adil, saksama bagi sesuatu standard, prosedur dan proses yang munasabah kepada orang yang disyaki, tahanan, tertuduh, banduan serta bekas banduan yang dibebaskan dengan parol.¹ Keadilan, dalam erti yang luas dan liberal, bukan semata-mata keadilan jenayah, adalah sebahagian daripada hak-hak asasi. Ia merupakan sesuatu yang hidup, organik serta dinamik dan dalam pencarian untuk mencari maknanya yang tertentu ia sering berubah, bergerak maju, lebih terbuka dan berkembang. Ketegaran, kemunduran, anakronisme dan positivisme tidak mempunyai tempat dalam mana-mana sistem keadilan di negara-negara *common law* pada masa kini. Dalam sistem undang-undang awam, ia disebut sebagai hak-hak asasi dan bagi para peguam hak asasi manusia ia dirujuk sebagai hak asasi manusia atau kebiasaannya sebagai kebebasan individu. Sebagai permulaan, *common law* dari masa ke semasa telah membentuk suatu asas yang boleh dihadkan atau dilengkapkan atau diperkuatkan dengan campur tangan undang-undang. Di Negara-negara seperti India dan Afrika Selatan, misalnya, di bawah inspirasi, sokongan dan pengaruh dari Perlembagaan yang dinamik, keadilan adalah sebahagian daripada agenda perlembagaan untuk perubahan dan kemajuan. Semua cabang kerajaan khususnya mahkamah secara aktif terlibat dalam mendorong perubahan dan kemajuan ini. Harus ditekankan di sini juga bahawa mahkamah tertinggi di negara-negara berkenaan melalui kreativiti dan aktivisme penghakiman telah

¹ Tesis ini akan memfokuskan kepada rejim keadilan jenayah di peringkat pra-perbicaraan dan juga perbicaraan dengan merujuk kepada beberapa sistem keadilan di bawah *common law* bagi tujuan perbandingan. Adalah di luar skop tesis ini untuk melihat keperluan keadilan selepas perbicaraan.

sentiasa memainkan peranan yang aktif dan sangat penting dalam proses perubahan, kemajuan dan keterbukaan ini. Seseorang mungkin bertanya bagaimanakah keadilan dalam *common law* yang dihadkan atau diperluaskan atau diperkuatkan oleh undang-undang, (dalam keadaan-keadaan yang berkaitan), dan keadilan perlembagaan yang lebih tinggi boleh wujud dan berfungsi bersama-sama. Ianya selalu dianggap dan diterima bahawa apa jua keadilan dalam *common law* berkembang secara perlahan dan lebih berbentuk konservatif yang memperuntukkan norma dan standard yang minimum. Sebaliknya, ia adalah suatu yang berbeza sama sekali apabila merujuk kepada hak-hak dari segi perlembagaan, norma atau standard. Selalunya Perlembagaan akan ditafsirkan dengan luas dan liberal dalam cara yang pragmatik dan dinamik oleh mahkamah kerana Perlembagaan merupakan suatu dokumen yang hidup, organik serta dinamik dan mampu untuk ditafsirkan dengan sedemikian rupa. Hakim-hakim yang mendukung kebebasan dan dipandu serta diberi kuasa oleh pendekatan yang liberal dalam menafsirkan Perlembagaan, dan berperanan di bawah mandat Perlembagaan serta keinginan untuk menegakkan keadilan, akan terus berusaha untuk memberikan kesan dan menghidupkan perkataan-perkataan dalam Perlembagaan dengan memasukkan norma yang lebih luas serta liberal yang sebahagian besar daripadanya adalah dari konvensyen hak asasi manusia antarabangsa. Dengan cara kewujudan undang-undang ini, hak-hak dari segi perlembagaan, norma-norma serta perlindungan akan diperluaskan serta menjadi liberal seiring dengan peredaran masa. Ini ditambah lagi dengan tanggapan bahawa Perlembagaan merupakan undang-undang tertinggi, maka kriteria perlembagaan yang lebih luas dan liberal akan mengatasi segala norma undang-undang lazim atau statut yang selalunya terhad dan ada kalanya bertentangan dengan standard dan keperluan perlembagaan. Dalam latihan akademik ini penulis akan berusaha untuk mengenal pasti dan menjelajah batas-batas dan ruang lingkup

norma-norma yang lebih liberal dan tinggi daripada beberapa negara *common law* yang dipilih dalam perbandingan dengan sistem keadilan jenayah Malaysia dalam usaha untuk menyemak dan menilai adakah sistem yang ada di Malaysia ini memenuhi norma-norma perlembagaan tertinggi yang telah diwujudkan dan diamalkan dalam sistem perundangan lain. Usaha juga akan dilakukan untuk menilai bagaimana sistem keadilan jenayah di Malaysia boleh ‘diperlembagaankan’, disahkan dan dipertingkatkan. Suatu perkara juga harus ditekankan di sini iaitu adalah tidak berbaloi bagi sistem kita untuk menabur benih ketidakadilan dengan menganiaya seseorang yang telah melakukan suatu kesalahan atau melakukan sesuatu yang salah di sisi undang-undang kerana kita sesungguhnya akan menuai apa yang telah kita semai.

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ABSTRACT

Whatever jurisprudential underpinning one takes of the matter, criminal justice regime in a common country with a written Constitution guaranteeing fundamental rights constantly strives to preserve, protect and defend fair, just and reasonable standards, procedures and processes for criminal suspects, detainees, accused persons, prisoners as well as ex-convicts on parole.² Justice, in its broad and liberal sense, no merely criminal justice, is part of fundamental right. It is living, organic and dynamic and the quest for it necessarily means that it is constantly changing, moving forward, expanding, liberalising and improving. Rigidity, retrogression, anachronism and positivism have no place in the criminal justice regime contemplated in this day and age in a common law country. In public law nomenclature, they are referred to as fundamental rights and to human rights lawyer as human rights or ordinarily as civil liberties. To begin with, common law over time has established a template which may be constricted or supplemented or strengthened by statutory interventions. In a country like India and South Africa, for example, under the auspices, inspiration and influence of a dynamic Constitution, justice is part of the determined constitutional agenda for change and progress. All branches of the government particularly the courts are actively involved in the push for change and progress. It must be emphasized here that the superior courts in those countries via judicial creativity and activism have always played an active and vital part and role in the process of change, progress and liberalization. One may often wonder how does justice at common law as curtailed or extended or strengthened by statutes, as the case may be, and the higher and

² This thesis focuses on the criminal justice regime at the pre-trial and trial stage in a few selected common law jurisdictions on a comparative basis. It is beyond the scope of this thesis to look at what justice entails after the trials.

more superior constitutional justice co-exist and operate. It is always presumed and, hence, accepted that justice of any kind at common law evolves slowly on a piece-meal basis and being conservative in nature, merely constitutes at most the basic and minimal norms or standards. Conversely, it is a different ball game altogether when it comes to constitutional rights or norms or standards. The latter are always construed broadly and liberally in a prismatic and dynamic fashion by the courts because the Constitution is a living, organic and dynamic document and, hence, capable of being construed as such. The libertarian judges, guided and empowered by the liberal rules of interpretation of the Constitution, and operating under the mandate of the Constitution as well as the impulse to do justice, will constantly strive to give effect and life to the words of the Constitution by incorporating broader and more liberal norms mostly from international human right conventions into the Constitution. By this law-creating process, the constitutional rights, norms and protections, etc., become extended and liberalised as time progresses. Coupled with and enhanced by the notion that the Constitution is the supreme law of the land, the extended, broader and more liberal constitutional criteria or norms or rights will take precedence over any existing common law or statutory norms which normally fall short of, or sometimes even contrary to, the constitutional standards or requirements. In this academic exercise, the writer will strive to identify and explore the limits and scope of the higher and more liberal norms from some selected common law countries in comparison and contrast with the Malaysian criminal justice system in order to examine and evaluate whether the existing Malaysian regime is in compliance with the higher constitutional norms which have been created and operated elsewhere in other jurisdictions. Attempts will also be made to examine how the current Malaysian criminal justice regime may be constitutionalised, legalised and improved. One sub-theme also needs to be clarified here, it is that it does not pay for our

system to sow the seeds of injustice by mistreating people who fall foul or have apparently fallen foul of the law because we will inevitably reap what we have sown.

The law is as at February 2011.

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8. *Prevention of Terrorism Act 2005.*
9. *Terrorism Act 2000.*

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2. *Title 18. Crimes and Criminal Procedure (18 USCS § 3481).*
3. *Bail Reform Act of 1966.*
4. *Federal Rules of Criminal Procedure.*
5. *Patriot Act 2001.*
6. *Perlembagaan Amerika Syarikat.*

D. Afrika Selatan

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2. *Constitutional Reform Act 2005.*
3. *Criminal Procedure Act No. 51 of 1977*
4. *Criminal Procedure Act No. 51 of 1977.*
5. *Legal Aid Act 22 of 1969.*
6. *Perlembagaan Afrika Selatan.*

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2. *Maintenance of Internal Security Act 1971.*
3. Perlembagaan India.
4. *Prevention of Terrorism Act 2002.*
5. *The National Security Act 1980.*
6. *The Preventive Detention Act 1950.*
7. *The Unlawful Activities (Prevention) Amendment Bill 2008.*
8. *Unlawful Activities (Prevention) Act 1967.*

F. Singapura

1. Kanun Prosedur Jenayah Singapura (Bab 68).

G. Hong Kong

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H. Deklarasi dan Konvensyen Antarabangsa

1. Deklarasi Hak Asasi Manusia Pertubuhan Bangsa-Bangsa Bersatu.
2. Konvensyen Hak Asasi Manusia Kesatuan Eropah.
3. Deklarasi Hak Asasi Manusia Pertubuhan Negara-negara Islam.
4. *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Resolusi A/RES/57/199, Pertubuhan Bangsa-Bangsa Bersatu).

5. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Resolusi 39/46 pada 10 Desember 1984, Pertubuhan Bangsa-Bangsa Bersatu).
6. *International Covenant on Civil and Political Rights* (Resolusi 2200A (XXI) pada 16 Desember 1966, Pertubuhan Bangsa-Bangsa Bersatu).
7. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Resolusi 43/173 pada 9 Desember 1988, Pertubuhan Bangsa-Bangsa Bersatu).
8. *Basic Principles on the Role of Lawyers* (Pertubuhan Bangsa-Bangsa Bersatu).
9. *Basic Principles for the Treatment of Prisoners* (Resolusi 45/111 pada 14 Desember 1990, Pertubuhan Bangsa-Bangsa Bersatu).

Senarai Singkatan

A.C.	Appeal Cases.
A.I.R.	All India Reporter.
A.L.J.	Australian Law Journal.
A.M.R.	All Malaysian Reports.
All.	Allahabad.
All E.R.	All England Law Reports.
Bom.	Bombay.
B.H.R.C.	Bar Human Rights Committee.
C.J.	Chief Justice.
C.L.J.	Current Law Journal.
C.L.R.	Commonwealth Law Reports.
Cal.	California.
Cap./c./ch.	Chapter.
Cmnd.	Command.
Col.	Colorado.
Cr. App.	Criminal Appeal.
Cr. App. R.	Criminal Appeal Reports.
Crim. L. Rev.	Criminal Law Review.
Crim. L.J.	Criminal Law Journal.
Del.	Delaware.
Dist.	District.
E & P	The International Journal of Evidence and Proof.
E.W.H.C.	High Court of England and Wales.
E.C.H.R	European Court of Human Rights.
E.H.R.R	European Human Rights Reports.
F.C.	Federal Court.
F.J.C.	Federal Court Judge.
F.M.S.	Federated Malay States.
Ga.	Georgia.
Guj. L.R	Gujerat Law Reports.
H.C.	High Court.
I.L.R.	Indian Law Report.
<i>Ibid.</i>	<i>Ibidem.</i>
<i>Id.</i>	<i>Idem.</i>
Ill	Illinois.
J. Cr.	Journal of Crime.
J.M.C.L.	Journal of Malaysian and Comparative Law.
K.B.	King's Bench.
L.N.S.	The Legal Network Series (unreported cases).
L.P.	Lord President.
L.R.I	Legal Resource Index.
M.L.J.	Malayan Law Journal.
M.L.R.	Michigan Law Review.
Mal. L.R.	Malayan Law Report.

Mad.	Madras.
Mass.	Massachusetts.
N.M.B.	Negeri Melayu Bersekutu.
N.Z.L.R.	New Zealand Law Reports.
O.R.L. Rev.	Oregon Law Review.
P.C.	Privy Council.
P.U.	Pemberitahuan Undang-Undang.
Q.B.	Queen's Bench.
Q.B.D.	Queen's Bench Division.
R.	Rex.
Reg.	Regina.
S.C.	Supreme Court.
S.C.J.	Supreme Court Judge.
S.J.L.S.	Singapore Journal of Legal Studies.
S.L.R.	Singapore Law Reports.
U.K.H.L.	United Kingdom House of Lords.
U.S.	United States.
Va.	Virginia.
W.L.R.	Weekly Law Reports.
Lah.	Lahore.
Punj.	Punjab.

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